

<b>IN THE MATTER OF</b>	)	
<b>THE PERMIT OF:</b>	)	
	)	
<b>WAL-MART STORES EAST, LP</b>	)	
<b>d/b/a WAL-MART SUPERCENTER NO. 1978</b>	)	<b>Permit No. DL50-20838</b>
<b>2505 NORTH OAK ROAD</b>	)	
<b>PLYMOUTH, INDIANA</b>	)	
	)	
<b>Applicant.</b>	)	

file related to this cause. Having been duly advised of the facts and law at issue, the Hearing Judge now submits the following Proposed Findings of Fact and Conclusions of Law for consideration by the ATC.

## **II. PROCEDURAL HISTORY**

1. On March 22, 2004, Applicant received the Notice of Denial stating that the ATC upheld the LB's recommendation to reject the Application.

2. On April 5, 2004, Applicant timely filed its request for administrative review and request for appeal within the fifteen (15) day deadline required by 905 IAC 1-36-2.

3. The ATC entered an Order on June 10, 2004, for a hearing to be held on August 10, 2004, to consider the denial of the Application.

4. On June 30, 2004, Applicant filed Petitioner's Motion for Pre-Hearing Conference.

5. On July 30, 2004, Hearing Judge Mark C. Webb issued an Entry Setting Pre-Hearing Conference which converted the previously scheduled August 10, 2004, appeal hearing to a pre-hearing conference.

6. On August 5, 2004, Applicant filed Petitioner's Verified Motion to Stay Proceedings pending the Indiana Supreme Court's decision in the appeal of *Ind. Ass'n of Beverage Retailers, Inc. v. Ind. Alcohol and Tobacco Comm'n*, 809 N.E.2d 374 (Ind. Ct. App. 2004) which addressed standing issues relevant to this matter.

7. On August 10, 2004, Hearing Judge Webb conducted a pre-hearing conference.

8. On August 20, 2004, Hearing Judge Webb issued an Entry Regarding Pre-Hearing Conference of August 10, 2004, requesting that Applicant and the remonstrators attempt to reach a settlement.

9. On September 14, 2004, Applicant filed Objections to Entry Regarding Pre-hearing Conference on the basis that, among other issues, persons who had failed to qualify as intervening remonstrators by filing a petition for intervention as remonstrator and proving themselves aggrieved or adversely affected were being treated as parties to the appeal.

10. On December 22, 2004, Applicant submitted to the ATC for approval a Settlement Agreement reached with remonstrator, Clifford Allen. The Settlement Agreement was never approved by the ATC because remonstrator, Pastor Mark Fishburn, refused to agree to any settlement.

11. On June 28, 2005, Applicant filed its Amended Objections to Entry Regarding Pre-Hearing Conference of August 10, 2004.

12. On June 28, 2005, Applicant filed Petitioner's Motion for Leave to Withdraw Petitioner's Verified Motion to Stay Proceedings, to Clarify Parties to this Appeal, and to Set the Case for Hearing.

13. On August 1, 2005, Hearing Judge U-Jung Choe issued an Order which: (i) denied Petitioner's Motion for Leave to Withdraw Petitioner's Verified Motion to Stay Proceedings; (ii) stayed the proceedings until the resolution of *Ind. Ass'n of Beverage Retailers, Inc. v. Ind. Alcohol and Tobacco Comm'n*; and (iii) required Petitioner to provide the Hearing Judge with regular reports regarding the status of the pending decision in *Ind. Ass'n of Beverage Retailers, Inc.*

14. On October 28, 2005, the Indiana Supreme Court issued its decision in *Ind. Ass'n of Beverage Retailers, Inc.*, 836 N.E.2d 255 (Ind. 2005).
15. On November 17, 2005, Wal-Mart filed a Motion for Reconsideration of the ATC's denial of the Application.
16. At the June 20, 2006, ATC meeting, the ATC denied Wal-Mart's Motion for Reconsideration.
17. On July 31, 2006, Wal-Mart filed its Motion for Administrative Review and Request for the Issuance of Findings of Fact requesting the ATC to declare Wal-Mart the sole party to this appeal and to set a hearing date.
18. On September 7, 2006, the ATC held a pre-hearing conference which was attended only by counsel for Applicant and the ATC.
19. On or about September 8, 2006, Hearing Judge U-Jung Choe issued an Order setting a hearing date and declaring Wal-Mart the only party to this appeal as no remonstrator had filed a petition for intervention as required by applicable law.
20. On October 5, 2006, Wal-Mart filed its Witness List.
21. On October 11, 2006, Hearing Judge U-Jung Choe conducted a hearing regarding this appeal.

### **III. EVIDENCE PRESENTED AT THE ATC HEARING**

A. The following testimony was offered at the ATC Hearing in favor of Applicant:

1. Brandon Vandonk, Store Manager, Wal-Mart Supercenter #1978.

Applicant continues to be qualified to hold, and does hold, an Indiana pharmacy permit. Applicant satisfies all statutory and regulatory requirements for a beer, wine and liquor dealer in an incorporated area. Eighty-three percent of Applicant customers polled

indicated their support of Applicant receiving the Permit. The poll of these customers consisted of signed petitions, and the manner in which Applicant collected the petitions was fair and unbiased. Numerous other Wal-Mart Supercenters throughout Indiana sell alcoholic beverages and have achieved an excellent record for complying with Indiana law regarding the sale of the same. Wal-Mart managers and associates are aware of Indiana's alcoholic beverage laws and will responsibly sell alcohol if granted the Permit. Applicant is a valuable member of the local community as an employer and in its generous charitable contributions. Applicant has implemented extensive training measures for all of its associates to ensure compliance with all alcoholic beverage laws. Applicant has a state-of-the-art security system that will minimize the risk of theft and illegal sale of alcoholic beverages. The selection of alcoholic beverages will be limited and the location of the same will be centralized so as to facilitate security measures. Mr. Vandonk's testimony showed there is a need and desire for the Permit and Applicant is a store in good repute in the community.

2. Susan Janik, Department Manager, Dry Groceries, Wal-Mart Supercenter #1978. Applicant has instituted extensive training and security measures to ensure compliance with alcoholic beverage laws and minimize the risk of theft. Only vendors will stock the alcohol in the store. Customers regularly express their desire for Applicant to sell alcohol.

3. Peter Kroll, Assistant Manager, Apparel, Wal-Mart Supercenter #1978. Apparel Department is adjacent to the area in which alcoholic beverages would be shelved. Associates in the Apparel Department, as with all associates at Walmart, are

trained to implement the security measures designed to minimize the theft of alcoholic beverages. Customers regularly express their desire for Applicant to sell alcohol.

4. Sean Hobson, Assistant Manager, Fresh Groceries, Wal-Mart Supercenter #1978. Mr. Hobson attended the LB Hearing. The remonstrators against Applicant at the LB Hearing appeared to be opposed to the Permit based on their general opposition to alcohol, not to Walmart. Applicant provides extensive training to associates regarding loss prevention and the sale of alcoholic beverages. Customers regularly express their desire for Applicant to sell alcohol.

5. Joe Gardner, Assistant Manager, Front End (Cashiers), Wal-Mart Supercenter #1978. Mr. Gardner oversees the approximately fifty cashiers employed at Wal-Mart. Each of the cashiers receives extensive training regarding the sale of alcoholic beverages. Customers continue to express their desire for Applicant to sell alcoholic beverages.

6. Walt Steward, Assistant Manager, Consumables, Wal-Mart Supercenter #1978. Applicant provides extensive training to associates regarding loss prevention and the sale of alcoholic beverages. On a regular basis, customers express their desire for Applicant to sell alcohol. Mr. Steward collected the nine letters in support from local business owners. Several other local business owners or managers have informally expressed to Mr. Steward their support of Applicant receiving the Permit, but were unable to submit letters of support unless it came from their corporate offices. Marshall County experienced population growth of seven percent between 1990 and 2000, and Plymouth, Indiana experienced an estimated 10.44% increase in population between 2000 and 2005, thereby increasing the need for additional alcoholic beverage outlets. No other

outlets are located in close proximity to Wal-Mart. Customers have expressed that one local alcoholic beverage outlet has a less than optimal atmosphere for purchasing alcohol. Applicant will provide a convenient alternative to such outlets. Applicant has an excellent record at other stores for compliance with alcoholic beverage laws. Marshall County has only issued one of the seven Type 208 permits allowed under quota. Mr. Steward also offered evidence comparing the number of dealer permits issued in Plymouth with the number issued in municipalities of comparable size and population. This evidence showed that municipalities of similar size to Plymouth, Indiana issued a greater percentage of the available Type 208 dealer permits allowed under the quota for the same.

B. The following exhibits were introduced at the ATC hearing by Applicant in favor of issuing the Permit:

1. Exhibit A - Manager's Statement of Brandon Vandonk;
2. Exhibit 1 - Applicant's Pharmacy Permit No. 60005085A.
3. Exhibits 2 & 11 - Nine letters of support from local business owners and petitions of 857 Wal-Mart customer signatures and with approximately 83% in favor of the Permit;
4. Exhibit 3 - *Inside Indiana Business* media release, "Walmart is one of the largest employers in Indiana";
5. Exhibits 4 & 5 - Signage depicting State and Federal alcoholic beverage laws displayed in aisles containing alcoholic beverages;
6. Exhibit 6 - Statistics showing Wal-Mart's positive impact on Indiana as an employer, supplier, taxpayer and charitable contributor;
7. Exhibit 7 - November 4, 2005, article, "Wal-Mart Saves Working Families \$2,329 Per Year; Has Net Positive Impact on Real Wages and Job Creation";
8. Exhibit 8 - Reprint of October 2006 press release, "Nation's Best Educators Honored in Wal-Mart's 11<sup>th</sup> Annual Teacher of the Year Program," demonstrating Wal-Mart's commitment to education and local communities;
9. Exhibit 9 - Reprint of December 15, 2005, press release, "Statement on Poll Showing Americans Believe Wal-Mart is a Good Place to Shop."
10. Exhibit 10 - Statistics showing Wal-Mart's extensive charitable contributions;

11. Exhibit 12 – Summary of security measures implemented at Wal-Mart;
12. Exhibit 13 – List of recipients of 2006 donations, grants and contributions made by Wal-Mart;
13. Exhibits 14 & 15 – Maps identifying the locations of other Type 208 permittees with respect to the location of Wal-Mart;
14. Exhibits 16 & 17 – Statistics showing available quota for and use of Type 115, Type 208 and Type 217 dealer permits in Marshall County, Indiana, and municipality of comparable size and population to Plymouth, Indiana;
15. Exhibits 18, 19 & 20 – Statistics showing the population growth of Marshall County, Indiana;
16. Exhibit 21 – February 1, 2005, letter from the ATC stating that package liquor stores and restaurants account for the majority of charges, settlement agreements and convictions related to alcoholic beverage laws violations, and that the number of alcoholic beverage law violations for drug stores is “insignificant.”

C. The following evidence and testimony was offered by remonstrators at the ATC

Hearing in opposition of Applicant in this cause:

1. Letter received from Mark Fishburn objecting to the issuance of the Permit and questioning the propriety of the methods by which Wal-Mart collected petitions.
2. Jim Hartman, local grain farmer. Minors should not be exposed to alcohol at Wal-Mart. In general, the sale and use of alcoholic beverages creates many problems in the community. Issuing the Permit will cause an increase in alcohol abuse and related problems.

#### **IV. FINDINGS OF FACT**

1. Wal-Mart is the applicant for the Type 208 ATC permit #DL50-20838. (ATC File).
2. Applicant has a pharmacy in its store which has been issued pharmacy permit no. 60005085A by the Indiana Professional Licensing Agency, Indiana Board of Pharmacy. (LB Hearing; ATC Hearing).



3. The ATC has determined that numerous other Wal-Mart stores identical to Applicant's store are "drugstores" pursuant to Indiana law. (ATC Records).

4. Applicant is of good moral character and good repute within the City of Plymouth and the State of Indiana. (LB Hearing; ATC Hearing).

5. No objections made by the remonstrators were directed in any way at the personal conduct or character of Applicant. (LB Hearing; ATC Hearing).

6. A majority of the remonstrators against Applicant were individuals or organizations generally opposed to the sale of alcohol. (LB Hearing; ATC Hearing).

7. None of the remonstrators timely filed a petition for intervention as remonstrator as required by 905 IAC 1-36-2(b). (ATC Files).

8. Applicant's associates are extensively trained to avoid problems with theft and the sale of alcoholic beverages to minors. (LB Hearing, ATC Hearing).

9. Based on the petitions submitted by Applicant, testimony regarding customer inquiries, and the fact that only one of the seven Type 208 permits allowed under the quota for Marshall County has been issued, there is a need and desire for the Permit. (LB Hearing; ATC Hearing).

10. The Permit is not being place within two hundred (200) feet of a church and/or school. (LB Hearing; ATC Hearing).

11. The Permit is being placed in a commercial location and is not being placed in a residential area. (LB Hearing; ATC Hearing).

12. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

## V. CONCLUSIONS OF LAW

1. Applicant filed an application for the Type 208 permit, #DL50-20838.  
(ATC Files).
2. Applicant is not disqualified from holding an ATC permit pursuant to IC 7.1-3-4-2(a)(13). (ATC Files).
3. Applicant is a drugstore which has a pharmacy permit, and thus qualifies to hold an ATC drugstore permit. (IC 7.1-3-10-2).
4. The ATC may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. (905 IAC 1-27-4).
5. Where a permittee shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. (ATC Findings of Fact and Conclusions of Law, *American Oil Company, Inc.*, Permit Nos. DL49-18873 and DL49-18879, *citing* 905 IAC 1-27-4(b)).
6. The LB's recommendation is clearly erroneous if there is a lack of substantial evidence that supports it. (IC 7.1-3-19-11).
7. The ATC may decline to follow the recommendation of the LB where the recommendation of the LB is not based on substantial evidence. (*Id.*).
8. The LB arbitrarily and capriciously denied the Application based on evidence submitted by remonstrators who did not show they had standing or were aggrieved or adversely affected, which is contrary to, and without observance of procedure required by, under Indiana law. (LB Hearing).

9. The ATC may reverse the LB's action in denying the application of a permit if it finds that the LB's decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence. (IC 7.1-3-19-11).

10. The ATC may also review a permittee's application *de novo*. (*Id.*).

11. Any Finding of Fact may be considered a Conclusion of Law if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the recommendation of the Local Board in the matter of Wal-Mart Stores East, LP, d/b/a Wal-Mart Supercenter #1978, 2505 North Oak Road, Plymouth, Indiana, was arbitrary and capricious, not based on substantial evidence and contrary to law and cannot be sustained. The appeal of Applicant is hereby GRANTED and the recommendation of the Marshall County Local Board in this cause is REVERSED.

**Comment [D1]:** Do you want this stated elsewhere?

DATE: \_\_\_\_\_

\_\_\_\_\_  
U-Jung Choe  
Hearing Judge